(1)

PROCEEDINGS AND ORDERS DATE: [02/11/92]

CASE NBR: [90107347] CFY STATUS: [DECIDED]
SHORT TITLE: [Smith, Roy]
VERSUS [United States] DATE DOCKETED: [030891]
PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Mar 8 1991	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Mar 28 1991		Waiver of right of respondent United States to respond filed.
4	Apr 4 1991		DISTRIBUTED. April 19, 1991
5	Apr 17 1991	F	Response requested -- JPS.
6	May 10 1991		Order extending time to file response to petition until June 17, 1991.
7	Jun 14 1991		Brief of respondent United States in opposition filed.
8	Jun 19 1991		REDISTRIBUTED. September 30, 1991
10	Oct 7 1991		REDISTRIBUTED. October 11, 1991
12	Oct 15 1991		REDISTRIBUTED. October 18, 1991
14	Oct 28 1991		REDISTRIBUTED. November 1, 1991
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PREVIOUS 1 1 EXIT

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PROCEEDINGS AND ORDERS DATE: [02/11/92]

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24	Dec 9 1991		REDISTRIBUTED. December 13, 1991
26	Dec 16 1991		Petition DENIED. Dissenting opinion by Justice Blackmun with whom Justice O'Connor and Justice Souter join. Statement by Justice Stevens. (Detached opinion.) Justice Thomas OUT.

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1 pp

90-7846

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROY SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

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SUPREME COURT, U.S.

24 pp

QUESTION PRESENTED FOR REVIEW

Whether, having found a violation of the Confrontation Clause, the court of appeals applied a flawed harmless-error analysis which discounted the key witness' testimony, but then improperly considered the remaining evidence "in the light most favorable to the government."

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROY SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner[1], Roy Smith, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on December 10, 1990.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, issued on December 10, 1990, is attached as App. 1.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). See Supreme Court Rule 10.1(a) and (c).

---

[1] All the parties to this proceeding and to the proceedings below appear in the caption of this case, except for the name of the co-defendant and co-appellant, Slade Miller.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "No person shall be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him."

STATEMENT OF THE CASE

On August 2 and 3, 1989, Roy Smith and Slade Miller were tried for first degree murder in violation of 18 U.S.C. section 1111, and conspiracy to commit murder in violation of 18 U.S.C. section 1117. The jury did not find either defendant guilty of first degree murder, but convicted both of second degree murder and conspiracy to commit murder. On October 5, 1989, each defendant was sentenced, pursuant to the Sentencing Guidelines, to a period of incarceration of 360 months on each count, to run concurrently.

The government's case relied in large part on the testimony of Cornell Warren, a witness who had entered into a favorable plea agreement with the government in exchange for his testimony. Warren was the only purported co-conspirator who pleaded guilty and testified against the defendants. His testimony was therefore critical in establishing Smith's purported participation in the conspiracy and killing. Like Smith and Miller, Warren had been indicted for first degree murder and conspiracy. He pleaded

guilty to conspiracy alone before Smith and Miller were tried, thereby guaranteeing that he would avoid the mandatory life sentence for first degree murder. Warren ultimately received a 60 month sentence for conspiracy to murder.

On direct examination, Warren provided an eyewitness account of the events, including testimony that was critical to establish Smith's culpability in both crimes. Through Warren, the prosecution established that Smith recruited Miller, obtained shanks from the dormitory, and stabbed at Speight's hand prior to the fatal blow by Miller. After Warren gave this testimony incriminating Smith for both murder and conspiracy, Smith's counsel attempted to cross-examine Warren on the subject of his plea agreement and resulting bias. The trial judge cut off defense counsel's cross-examination on these subjects and took over the questioning. The judge elicited testimony that was damaging to the defense and then refused to permit any further questions from defense counsel notwithstanding counsel's objections.

Mr. Smith appealed to the United States Court of Appeals for the Fourth Circuit, arguing that the interference with cross-examination violated the Confrontation Clause. The court of appeals ruled that "the court's blanket pre-trial restriction, followed by its complete preemption of already restricted cross-examination [at] trial, constituted too serious a threat to the constitutional right at stake to be approved." App. 11. The court then explained that the error required reversal unless it was

harmless beyond a reasonable doubt. In applying the harmless error inquiry, the court discounted the key witness' testimony, but then improperly considered the remaining evidence "in the light most favorable to the government." App. 12. According to the court, this evidence was "obviously sufficient to convict if believed." App. 13. Under these standards, Mr. Smith's convictions were affirmed.

REASONS FOR GRANTING CERTIORARI

THE FOURTH CIRCUIT'S APPLICATION OF A SUFFICIENCY TEST CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, AND FUNDAMENTALLY ALTERS HARMLESS ERROR ANALYSIS

Because a defendant's right to confront the witnesses against him is protected by the Sixth Amendment, this Court has held that the burden is on the government "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). As this Court explained in Delaware v. Van Arsdall, 475 U.S. 673 (1986), where a defendant's cross-examination of a prosecution witness has been impeded, "the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial." Id. at 680. The Court further held that:

> [t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. at 684 (citations omitted).

In contrast to these principles, the Fourth Circuit has applied a harmless error standard which discounts the key witness' testimony, except as corroborated by other evidence, but then examines the remaining evidence "in the light most favorable to the government." App. 12. This standard improperly confuses the harmless error inquiry with that of the adequacy of the government's case to support a submission of the question of guilt or innocence to the jury. See, e.g., Jackson v. Virginia, 443 U.S. 307 (1979).[2] These two standards are fundamentally different from each other.

The Fourth Circuit's harmless error analysis is inconsistent with applicable decisions of this Court. This Court has expressly rejected a harmless error standard that merely assesses whether there was enough evidence to support the result. In Satterwhite v. Texas, 486 U.S. 249, 258-259 (1988), this Court explained that the question "is not whether the legally admitted evidence was sufficient to support the death sentence . . . but rather, whether the State has proved 'beyond a reasonable doubt that the error

[2] Although the Fourth Circuit described the evidence as "overwhelming" (App. 13), this comment must be considered with caution because the court had examined the evidence in the light most favorable to the government.

complained of did not contribute to the verdict obtained.' Chapman, 386 U.S., at 24." Indeed, this Court has emphasized that harmless error analysis is different from sufficiency analysis even in cases involving nonconstitutional error. See Kotteakos v. United States, 328 U.S. 750, 765 (1946) ("[t]he inquiry cannot be merely whether there was enough to support the result"). The United States Court of Appeals for the District of Columbia Circuit has also expressly rejected the harmless error standard that was used by the Fourth Circuit in this case. In Taylor v. United States, 414 F.2d 1142 (D.C. Cir. 1969), the government argued that the court should affirm if the evidence viewed in the light most favorable to the government met the Chapman v. California, 386 U.S. 18 (1967) standard for harmless error. The court refused to adopt this standard, and reasoned that "[i]n applying Chapman, we must look to all the evidence, defense and prosecution alike, and bring our judgment to bear upon the question of whether it is clear to us beyond a reasonable doubt that a guilty verdict would have resulted even if the jury had never heard the challenged testimony." Taylor, 414 F.2d at 1144-45. (citation omitted). Thus, the Fourth Circuit's harmless error standard conflicts with both applicable decisions of this Court and those of other circuit courts of appeals.

The Fourth Circuit's examination of the evidence in the light most favorable to the government presents many dangers. First,

this formulation of the harmless error standard weighs heavily in favor of the government and virtually assures that the constitutional error will be deemed harmless. Thus, the standard creates a grave risk that constitutional violations will be characterized as harmless beyond a reasonable doubt in cases where in the absence of the error, a guilty verdict might not have resulted. This risk cannot be reconciled with the underlying purpose of the harmless error rule: to promote "public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." Delaware v. Van Arsdall, 475 U.S. 673, 687 (1986). In addition, the Fourth Circuit's formulation of the harmless error rule violates fundamental fairness because it necessarily causes credibility determinations to be resolved in favor of the government.

The Fourth Circuit's opinion has the potential of affecting scores of cases. Most types of constitutional and other errors are subject to harmless error analysis. These errors range from Sixth Amendment confrontation clause violations (as in this case), to errors occurring in a grand jury proceeding. See United States v. Mechanik, 475 U.S. 66, 72-73 (1986). Accordingly, the Fourth Circuit's harmless error analysis has the potential for affecting large number of cases, both on direct appeal and on collateral review.

CONCLUSION

This court should issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit so that this Court may resolve the conflict between the proper harmless error standard and the sufficiency analysis applied by the Fourth Circuit.

Respectfully Submitted,

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March 8, 1991

APPENDIX

United States v. Roy Smith, 919 F.2d 734 (unpublished) (4th Cir. December 10, 1990). . . . . .App. 1

Judgment of the U.S. District Court for the Eastern District of Virginia (October 5, 1989). . . . . App. 16

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-5475

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ROY SMITH,

Defendant - Appellant.

No. 89-5478

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

SLADE MILLER,

Defendant - Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge. (CR-89-196-A)

Argued: October 5, 1990 Decided: December 10, 1990

Before PHILLIPS and WILKINSON, Circuit Judges, and WILSON, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Mary Melissa French, Assistant Federal Public Defender, Baltimore, Maryland, for Appellant Smith; Joseph N. Bowman, Alexandria, Virginia, for Appellant Miller. Bernard James Apperson, III, Assistant United States Attorney, Alexandria, Virginia, for Appellee. **ON BRIEF:** Fred Warren Bennett, Federal Public Defender, Baltimore, Maryland, for Appellant Smith. Henry E. Hudson, United States Attorney, W. Neil Hammerstrom, Jr., Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Roy Smith and Slade Miller appeal their respective convictions, following a joint trial, of conspiracy to commit murder and second degree murder arising from Miller's killing of Joseph Speight, their fellow inmate at Lorton Reformatory. Smith claims constitutional error in the limitation of his cross-examination of a government witness and insufficiency of the evidence to convict him of conspiracy. Miller claims ineffective assistance of counsel and error in the district court's refusal to conduct a hearing on that claim. We find no reversible error and affirm the convictions.

I

Assessed in the light most favorable to the government, see United States v. Steed, 646 F.2d 136, 139 (4th Cir. 1981), the evidence at trial indicated the following sequence of events. Smith and the victim, Joseph Speight, had a fight one afternoon. After guards broke up the fight, Smith and Miller returned to their prison dormitory. Once there, they discussed attacking Speight. Then Miller, in Smith's presence, took a shank (a prison-made knife) from Smith's locker. Smith and Miller then went to the victim's cell in a nearby dorm. A fight soon broke out between Smith and the victim. Corrections Officer Simpson tried to restrain Speight, but he broke free. After Speight broke free, Smith grabbed and held Officer Simpson against the wall. Miller then approached Speight and stabbed him in the chest with the shank

while Smith held Officer Simpson. Speight died five days later of the stab wounds.

Smith and Miller were each indicted for first degree murder and conspiracy to commit murder, in violation of 18 U.S.C. §§ 1111 and 1117.

Before their joint trial, the government moved to prohibit defense counsel from eliciting any testimony about the penalty for the first degree murder charge (mandatory life imprisonment) during cross-examination of a government witness, Cornell Warren, who was also charged with first degree murder and conspiracy in connection with the killing, but had agreed to be a government witness in exchange for a guilty plea on the conspiracy charge only. The district court did not grant the government's motion, but instead told defense counsel that though counsel could ask Warren questions about the negotiations with the government, counsel should not reveal that Warren had faced a mandatory life sentence for murder. The asserted reason for the court's concern was that this information could sway the jury in considering the guilt of Smith and Miller, who were also charged with first degree murder. During defense counsel's cross-examination of Warren, counsel attempted to show bias by asking questions about the plea bargain agreement. The government objected, and the court quickly cut off counsel and took over questioning the witness. After the court received contradictory statements from the witness about his understanding of the benefits of the plea bargain agreement, the court ordered counsel to "move on."

This appeal followed the jury's conviction of both defendants for the lesser included offense of murder in the second degree, and conspiracy to commit murder.

Smith assigns constitutional error to the trial court's limiting the cross-examination of Warren. He also challenges the sufficiency of the evidence to convict him of conspiracy. Miller assigns error to the trial court's denial of his pro se motion for new trial for ineffective assistance of counsel and denial of a hearing on the motion. We consider these issues in turn.

II

Smith contends that the limitation of his cross-examination concerning Warren's plea bargain agreement unconstitutionally denied him the ability to show bias or self-interest of the witness.[1]

Warren obviously was a helpful witness for the government. He was the only originally-charged co-conspirator to testify, provided an eyewitness account of the events (as did others), and helped establish the link between Smith and Miller. Moreover, Warren was the only witness to testify that Smith also had a shank in his hand when Smith and Miller attacked the victim. Finally, the government used Warren to introduce statements by another

[1]This issue is preserved only for Smith and not for Miller, since only Smith's counsel raised Warren's plea agreement during cross-examination, only Smith's counsel objected to the government's motion in limine to bar references to punishment, and indeed Miller's defense actually relied heavily on Warren's testimony. See J.A. at 314-20.

co-conspirator (who did not testify) that Smith had obtained shanks in preparation for visiting the victim's dorm.

Cross-examination of Warren, including efforts to impeach him by showing self-interest or bias, was obviously important to Smith's defense. When counsel first broached the subject of his possible incentives for testifying as a government witness, the court, following up on its pre-trial ruling, cut counsel off and took over the questioning. First, the court asked Warren whether his lawyer had told him that by pleading guilty he would probably get less time than if he were tried and convicted. Warren answered "Yes." The court then asked whether in pleading guilty he thought he would get less time than if he were tried and convicted. To this Warren answered that he pled guilty because "I knew I was wrong." The court then pursued the matter, and the following colloquy occurred.

> THE COURT: [Y]our lawyer did tell you before you pled guilty -- . . . [t]hat you would probably get less time if you pled guilty than if you were tried and convicted, is that a fair statement?
>
> WITNESS: Well, he said that if I pled guilty, I could be given up to the same amount of time if I had gone to trial. That is what he said.
>
> THE COURT: All right. Counsel, that pretty well burns it out. Move onto something else.
>
> [DEFENSE COUNSEL]: Your Honor, may we approach the bench?
>
> THE COURT: Counsel, I have ruled on it and your objection to my ruling is in the record. That is all you are entitled to.
>
> [DEFENSE COUNSEL]: That's all the questions.

J.A. at 170-71. This exchange took place after defense counsel had explored Warren's substantive testimony and constituted the whole of counsel's effort to impeach by showing self-interest.

Smith contends that the court's restriction of his ability to cross-examine Warren to show self-interest denied him the rights secured by the confrontation clause. He argues that especially where plea-bargained testimony is being used, a defendant has an affirmative right to probe the witness's understanding of the agreement, so as to highlight for the fact-finder evidence of self-interest, and substantial denial or infringement of that right constitutes constitutional error.

We believe that the record compels us to assume that constitutional error occurred here.

Basic to the right of confrontation is the right to cross-examine a hostile witness to undermine his credibility by showing bias or self-interest. Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986). Cross-examination for this purpose should be limited only for the most compelling reasons, such as to prevent harassment, unduly repetitive questioning, or threats to the witness's safety. Davis v. Alaska, 415 U.S. 308, 316 (1974); Chavis v. North Carolina, 637 F.2d 213, 226 (4th Cir. 1980). As we have held, "When such factors are not present, substantial limitations on the attempts of a defendant to undermine as biased a witness' testimony constitute constitutional error." Hoover v. Maryland, 714 F.2d 301, 305 (4th Cir. 1983).

Even in those areas where some limitations are permissible, a court may err by cutting off cross-examination before "'the constitutionally required threshold level of inquiry has been afforded the defendant.'" Id. (quoting United States v. Tracey, 675 F.2d 433, 437 (1st Cir. 1982)); United States v. Caudle, 606 F.2d 451, 458-59 (4th Cir. 1979) (error to restrict until the right to probe and question has been "substantially and thoroughly exercised"). Here, in addition to effectively taking over the whole of defense counsel's efforts to impeach at trial, the court had cut off any inquiry into the exact nature of the most extreme punishment with which the witness was threatened and possibly had avoided by his guilty plea.

There is no assertion by the government here, nor could there be, that any of the above factors warranting limitations on cross-examination, including that imposed pre-trial, are present. Instead, the government contends that the court's restriction on cross-examination, both in its blanket pre-trial prohibition and in its take-over at trial, did not constitute constitutional error. And in a fall-back position, it suggests that any error was harmless beyond a reasonable doubt. We take these in turn.

A

We first consider the blanket prohibition against any inquiry into the exact punishment to which Warren was exposed on the first degree murder charge. The court's asserted basis for imposing this flat restriction was that because punishment is not

a relevant consideration for a jury's deliberation on the guilt of a defendant, it should not be permitted to come in by the indirect means of revealing the punishment faced by a comparably charged government witness. We are not persuaded by this.

Laying aside the attenuation of the principle's application where, as here, the punishment being brought out is that faced by another than the defendant on trial, we think there is a more basic reason for rejecting the government's argument.

It lies in the fact that in many contexts evidence not admissible for substantive purposes may nevertheless be admissible, as a matter of overriding necessity (with appropriate cautionary instructions), for impeachment or other collateral purposes. Thismay be so even when those purposes are not constitutionally grounded. See, e.g., Fed. R. Evid. 408 (offers of compromise). And the admission of such evidence for collateral purposes is even more plainly a necessity where the purpose, here impeachment, is constitutionally protected. Davis, 415 U.S. at 315-18 (constitutional error to restrict impeachment by cross-examination on basis of valid state rule limiting evidence of juvenile adjudication).

Here, a vital link in showing Warren's self-interest was the exact punishment that he avoided as risk (mandatory life sentence if convicted of first degree murder) by pleading guilty to conspiracy as part of his plea agreement. The effect of the restriction was completely to exclude this from the jury's consideration, a result we conclude was not warranted by either of the considerations advanced by the government.

The court's effective preemption of counsel's attempted cross-examination at trial also raises serious constitutional questions. The basic question as to this is whether counsel's effort to impeach by cross-examination was essentially cut off before "the constitutionally required threshold level of inquiry had been afforded." Hoover, 714 F.2d at 305. There is no question that it was effectively cut off before any real inquiry had been made. The government does not contend otherwise, but only that the court's examination of the witness was essentially as effective for the purposes now asserted as could have been defense counsel's. Specifically the government points to the fact that the court elicited at one point the most favorable possible concession by the witness: that he had indeed been told by his counsel, and believed, that he "probably" would receive a lower sentence by pleading guilty than by going to trial. The defendant's response is that the witness' later response, facially contradictory, was that he was told in effect that it might make no difference, that he "could" get as much one way as the other. When the court refused to pursue the inquiry past this point, or to allow defendant's counsel to do so, the contention is that this did not afford the minimal threshold opportunity for inquiry constitutionally mandated.

We think it a close question whether the right was substantially infringed by the court's action. It is true that the court's questioning developed the ultimate fact that there was some degree of self-interest behind the witness' testimony. The defendant's argument is essentially that the full extent of that

interest was not developed, and that his constitutional entitlement was to develop the full measure of that interest.

We are satisfied that in combination the court's blanket pre-trial restriction, followed by its complete preemption of already restricted cross-examination on trial, constituted too serious a threat to the constitutional right at stake to be approved. For purposes of this appeal, we therefore assume that constitutional error was committed and that it requires reversal unless the error can be found harmless.

B

As to this possibility, the question is whether the error, being of constitutional dimension, can be declared by us to be harmless beyond a reasonable doubt. See Van Arsdall, 475 U.S. at 684 (constitutionally improper denial of a defendant's opportunity to impeach a witness for bias subject to Chapman v. California harmless-error analysis). As put more specifically by the Van Arsdall Court, "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Id. The Court identified the following factors that should be considered: importance of the witness's testimony to the prosecution's case; whether the testimony was cumulative; presence or absence of evidence corroborating or contradicting the material testimony of the witness; the extent of

cross-examination permitted; and, of course, the overall strength of the prosecution's case. Id.

Essentially discounting Warren's testimony except as it is corroborated by other evidence, and considering all that remains in the light most favorable to the government, the evidence was sufficient to support findings beyond a reasonable doubt as follows. After having a fight with the victim in the gym, Smith and Miller returned to their dorm where Smith told Miller "we are going to get [the victim]", J.A. at 58, to which Miller responded "Yes, sucker. Man, we can go get him now." Id. Miller also said to Smith, "You should go do the nigger", J.A. at 124, which was generally understood within the lexicon of the prison community as a statement of intention to kill. J.A. at 126.

As Smith and Miller prepared to leave for the victim's prison dorm, Miller, in Smith's presence, procured shanks, or prison-made knives ("It looked to be like an ice pick.", J.A. at 125), from Smith's locker. J.A. at 136. Smith and Miller then left their dorm together headed to the victim's dorm. J.A. at 59. Once in the victim's dorm, Smith and Miller started a fight with the victim. J.A. at 61-62. After this fight was broken up by the guard, another fight broke out between Smith and the victim. The guard then tried to separate the two inmates. J.A. at 193-95. At this point Smith grabbed and held the only prison guard in the room while Miller stabbed the victim. J.A. at 196-97.

This evidence, obviously sufficient to convict if believed, was only disputed by Smith's assertion that he purposefully held Officer Simpson only to protect him from harm.

From this, we are able to say with confidence that Warren's testimony to the effect that Smith planned with Miller to kill Speight, though undoubtedly helpful to the prosecution because he was a charged co-conspirator, was to a large extent either cumulative or generally corroborated by other testimony.[2] It also demonstrates the great overall strength of the government's case independently of Warren's testimony. Particularly when we weigh the guard's conflicting account against Smith's facially implausible testimony that he held the guard only to protect him, we are confident that the evidence, with Warren's testimony fully discounted, was overwhelming that Smith was involved in the planning and execution of the murder. And this permits us to conclude that any error in restricting the impeachment of Warren as a witness was harmless beyond a reasonable doubt.

This case is far different from Hoover v. Maryland, in which we found that "if the jury doubted [the witness's] story

[2]Smith highlights the fact that Warren was the only witness who testified that he had a shank and used it to stab the victim, and that other witnesses said they did not see Smith holding a shank. Such testimony, however, is not crucial to the conspiracy or murder conviction since these convictions could still be sustained without this evidence based on either a Pinkerton instruction derived from the conspiracy charge, see J.A. at 361-62 (co-conspirator liable for acts committed in furtherance of conspiracy), or under the aiding and abetting statute, 18 U.S.C. § 2.

there would have been little else on which to base a guilty verdict." 714 F.2d at 306.

III

Smith also challenges the sufficiency of the evidence to sustain his conviction for conspiracy to murder. He contends that the evidence only points to a conspiracy to fight the victim, not to kill him, and that Miller's stabbing of the victim was a spontaneous act.

In order to convict Smith of conspiracy to murder, the government had to prove that Smith intended to kill the victim or knew that Miller intended to kill the victim and that the objective of his actions was the murder of Speight. As the district judge correctly charged the jury, a tacit mutual understanding to kill the victim by a common design is enough.

We need not again summarize the critical evidence of Smith's relationship and conduct with Miller leading up to the murder at Miller's hand. In its most favorable light it supports a finding of a tacit mutual understanding between the two to kill the victim. It also suffices to support a finding of at least two overt acts in furtherance of the conspiracy. We hold that this evidence suffices to sustain a conviction of conspiracy to murder.

IV

Miller seeks to raise on appeal a claim of ineffective assistance of counsel--specifically that his counsel failed without

adequate reason to challenge a report of the medical examiner and instead stipulated that the contents of the report could be received as the medical examiner's testimony.

The government points out correctly that such a claim may not be raised on direct appeal, but only by a motion under 28 U.S.C. § 2255, because it is not one that can be decided on the trial record. See United States v. Lurz, 666 F.2d 69, 78 (4th Cir. 1981). We reject defendant's contention that he was entitled to an evidentiary hearing to develop the issue on his post-verdict motion for new trial.

AFFIRMED

United States District Court

EASTERN District of VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA

V.

OCT 5 1989

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM AC

Case Number CR89-196-A(02)

ROY SMITH
(Name of Defendant)

James Clyde Clark & C. Dean Latsios
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) 1 and the lesser included offense in Count 2 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 U.S.C. §1117	Conspiracy to commit murder	1
18 U.S.C. §1111 & §2	Second degree murder	lesser included offense in Count 2

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on ~~count(s)~~ greater offense in Count 2, and is discharged as to such count(s).
☒ Count(s) 3 (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 100.00, which shall be due immediately. Special assessment consists of $50.00 as to each of Counts 1 & 2

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
579-66-1378

October 5, 1989
Date of Imposition of Sentence

Defendant's mailing address:
D.C. Department of Corrections
Maximum Security
Lorton, Virginia

Richard L. Williams
Signature of Judicial Officer
Richard L. Williams
U.S. District Judge
Name & Title of Judicial Officer

Defendant's residence address:
unknown

I hereby certify the foregoing to be a true copy, teste:
Eugene K. Casey, Clerk
By: _____
Deputy Clerk

October 5, 1989
Date

BEST AVAILABLE COPY

Defendant: ROY SMITH
Case Number: CR89-196-A(02)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of three hundred and sixty(360)months as to each of Counts 1 and 2. Sentence on Count 1 shall run consecutively with the sentence the defendant is presently serving. Sentence on Count 2 shall run concurrently with sentence on Count 1.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m. / p.m. on _____.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: ROY SMITH
Case Number: CR89-196-A(02)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of _____ five(5)years on each of Counts 1 and 2, to run concurrently with each other.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

BEST AVAILABLE COPY

Defendant: ROY SMITH
Case Number: CR89-196-A(02)

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;
6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

BEST AVAILABLE COPY

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
JUN 14 1991
OFFICE OF THE CLERK

No. 90-7347

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

NINA GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court's limitation of petitioner's cross-examination of a government witness was harmless error.

IN THE SUPREME COURT OF THE UNITED STATES

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TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1990. The petition for a writ of certiorari was filed on March 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiracy to commit murder, in violation of 18 U.S.C. 1117, and second degree murder, in violation of 18 U.S.C. 1111. He was

sentenced to 30 years' imprisonment. The court of appeals affirmed. Pet. App. 1-15.

1. Petitioner, an inmate at Lorton Reformatory, was involved in planning and carrying out the murder of another inmate. He was charged with conspiracy to commit murder and first degree murder. Pet. App. 3-4.

Prior to trial, the government moved for an order prohibiting petitioner's counsel from eliciting testimony that the penalty for first degree murder is mandatory life imprisonment during his cross-examination of a government witness. The witness, Cornell Warren, had also been charged with conspiracy and first degree murder in connection with the killing, but had entered a guilty plea on the conspiracy charge and had agreed to testify as a witness for the government at petitioner's trial. In response to the government's motion, the district court told petitioner's counsel that he could question Warren about his plea negotiations with the government, but should not reveal the sentence Warren had faced for first degree murder. Pet. App. 4.

At trial, petitioner's counsel attempted to cross-examine Warren about his plea agreement with the government in an effort to undermine his credibility. When the government objected, the district court took over questioning of the witness. After Warren gave arguably inconsistent answers concerning his

understanding of the benefits of the plea agreement,[1/] the court ended the questioning and ordered petitioner's counsel to "[m]ove onto something else." Pet. App. 4, 6. The jury convicted petitioner of conspiracy to commit murder and second degree murder. Pet. App. 5.

2. On appeal, petitioner argued that the district court's restriction of his cross-examination of Warren violated his rights under the Confrontation Clause of the Sixth Amendment. Pet. App. 5. The court of appeals found it "a close question" whether petitioner's confrontation rights were "substantially infringed" by the district court's preemption of his cross-examination of Warren, but stated that "[f]or purposes of this appeal," it would "assume that constitutional error was committed." Pet. App. 10-11. The court concluded, however, that because the error was "harmless beyond a reasonable doubt," reversal of petitioner's conviction was not required. Pet. App. 13.

In addressing the harmless error question, the court stated that the appropriate inquiry, as set forth by this Court in Delaware v. Van Arsdall, 475 U.S. 673 (1986), is "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that

---

[1/] Warren first testified that his lawyer had told him that by pleading guilty he would probably receive a lesser sentence than if he were tried and convicted. Pet. App. 6. In response to a subsequent question, however, he stated that his lawyer had "said that if I pled guilty, I could be given up to the same amount of time if I had gone to trial." Ibid. Strictly speaking, of course, these two statements are not inconsistent.

the error was harmless beyond a reasonable doubt." Pet. App. 11 (quoting Van Arsdall, 475 U.S. at 684). The court of appeals noted that the Van Arsdall Court identified a number of factors to be considered in determining whether the erroneous restriction of a defendant's cross-examination of a government witness was harmless, including the "importance of the witness's testimony to the prosecution's case; whether the testimony was cumulative; presence or absence of evidence corroborating or contradicting the material testimony of the witness; the extent of cross-examination permitted; and, of course, the overall strength of the prosecution's case." Pet. App. 11-12. See Van Arsdall, 475 U.S. at 684.

The court then summarized the government's evidence against petitioner, explaining that it was "[e]ssentially discounting Warren's testimony except as it is corroborated by other evidence, and considering all that remains in the light most favorable to the government." Pet. App. 12. The evidence showed that petitioner and a co-defendant engaged in a fight with the victim and then agreed that they would kill him. After obtaining prison-made knives, the two men went to the victim's dormitory. There, petitioner restrained the only prison guard who was present, while his co-defendant stabbed the victim. Pet. App. 12-13. The court noted that the only evidence offered by petitioner to dispute the government's case against him was petitioner's testimony that he had restrained the guard to protect him from harm. Pet. App. 13.

The court then applied the factors set forth in Van Arsdall. It found that Warren's testimony, "though undoubtedly helpful to the prosecution, * * * was to a large extent either cumulative or generally corroborated by other testimony." Pet. App. 13. The court also noted the "great overall strength of the government's case independently of Warren's testimony." Ibid. The court concluded that even "with Warren's testimony fully discounted," the evidence was "overwhelming that [petitioner] was involved in the planning and execution of the murder." Ibid. Accordingly, the court held that "any error in restricting the impeachment of Warren as a witness was harmless beyond a reasonable doubt." Ibid.

ARGUMENT

Petitioner contends (Pet. 4-7) that the court of appeals applied the wrong standard in determining that any error in the district court's limitation of his cross-examination was harmless. He asserts that the court of appeals, by viewing the evidence "in the light most favorable to the government," confused the harmless error standard with the test for determining whether the government's evidence was sufficient to support a conviction. Petitioner's contention rests on a misreading of the court of appeals' opinion.

Petitioner relies on the court's statement that the evidence against petitioner, viewed "in the light most favorable to the government," was "obviously sufficient to convict." Pet. App. 12-13. But the court of appeals' analysis did not stop there.

After reviewing all the evidence -- including petitioner's testimony in his own defense -- the court stated that it "was confident that the evidence, with Warren's testimony fully discounted, was overwhelming that [petitioner] was involved in the planning and execution of the murder." Pet. App. 13. Applying the factors enumerated in Delaware v. Van Arsdall, supra, the court concluded that any error in the restriction of petitioner's cross-examination of Warren was "harmless beyond a reasonable doubt." Pet. App. 13. Thus, the court of appeals adhered to "the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Van Arsdall, 475 U.S. at 681. No further review is warranted.[2/]

[2/] Petitioner's suggestion (Pet. 6) that the court of appeals' decision in this case conflicts with the decision in Taylor v. United States, 414 F.2d 1142 (D.C. Cir. 1969), is incorrect. In Taylor, the court held that the erroneous admission of two witnesses' in-court identifications of the defendant was harmless. Id. at 1144. The court explained that it arrived at this conclusion by "look[ing] to all the evidence, defense and prosecution alike, and bring[ing] our judgment to bear upon the question of whether it is clear to us beyond a reasonable doubt that a guilty verdict would have resulted even if the jury had never heard the challenged testimony." Id. at 1144-1145 (footnote omitted). That is essentially the analysis the court of appeals applied here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

NINA GOODMAN
Attorney

JUNE 1991

NO. 90-7347

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ROY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT ALL PARTIES REQUIRED TO BE SERVED HAVE BEEN SERVED COPIES OF THE BRIEF FOR THE UNITED STATES IN OPPOSITION BY MAIL ON June 14, 1991.

FRED WARREN BENNETT
FEDERAL PUBLIC DEFENER
MARY MELISSA FRENCH
ASSISTANT FEDERAL PUBLIC DEFENDER
401 EQUITABLE BANK CENTER, TOWER II
100 SOUTH CHARLES STREET
BALTIMORE, MD 21201

Kenneth W. Starr

KENNETH W. STARR
SOLICITOR GENERAL

June 14, 1991

(4)

SUPREME COURT OF THE UNITED STATES

ROY SMITH *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 90–7347. Decided December 16, 1991

The petition for a writ of certiorari is denied.

JUSTICE THOMAS took no part in the consideration or decision of this petition.

Opinion of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

For the reasons stated in JUSTICE BLACKMUN'S dissenting opinion, there is no escape from the conclusion that the Court of Appeals committed error in this case. I write only to note that I find it difficult to articulate an acceptable theory of discretionary review that would explain both the Court's denial of certiorari in this case and its summary reversal in *Mireles* v. *Waco*, *ante* p. ___ *(per curiam)* and *Hunter* v. *Bryant*, *ante* p. ___ *(per curiam)*.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR and JUSTICE SOUTER join, dissenting.

Petitioner Roy Smith claims that the Court of Appeals for the Fourth Circuit reviewed his conviction in a manner inconsistent with this Court's precedents on the application of harmless-error analysis. I agree. I would grant the petition, summarily vacate the judgment, and remand the case to the Court of Appeals.

Petitioner and a codefendant, Slade Miller, were tried jointly for federal murder and conspiracy to commit murder, in violation of 18 U. S. C. §§ 111 and 1117, on charges arising from the killing of a fellow inmate at Lorton Reformatory in Virginia. The Government's case relied in significant part on the testimony of Cornell Warren,

another co-conspirator who had entered into a cooperating plea agreement. Warren established the link between Smith and Miller and introduced statements by still another co-conspirator (who did not testify) that Smith had obtained shanks (prison-made knives) in preparation for the killing. Warren also testified that Smith had used a shank to stab the victim. Other witnesses testified that Miller stabbed the victim, while Smith restrained the only guard in the room.

On cross-examination, the court pre-empted defense counsel's attempt to question Warren about his possible incentives for testifying as a Government witness. In response to the judge's questioning, Warren gave contradictory testimony as to whether or not his lawyer had told him that he would probably receive a lesser sentence by pleading guilty than if he were tried and convicted. Over defense counsel's objections, the court then refused to permit further questions. The jury convicted Smith of conspiracy to commit murder and second-degree murder.

Smith appealed, asserting that the court had violated his rights under the Confrontation Clause of the Sixth Amendment by denying him the ability to show bias or self-interest in the witness. For purposes of the appeal, the Court of Appeals assumed that constitutional error was committed and that reversal was required unless the error could be found to be harmless beyond a reasonable doubt.

In reviewing the Government's evidence against Smith, the Court of Appeals explained that it was "[e]ssentially discounting Warren's testimony except as it is corroborated by other evidence, and considering all that remains in the light most favorable to the government . . . ." See *United States* v. *Smith*, No. 89–5475 (CA4, unpublished, Dec. 10, 1990), p. 12, affirmance order, 919 F. 2d 734. The court found that this evidence, "obviously sufficient to convict if believed," was contradicted only by "Smith's facially implausible testimony that he held the guard only to protect him." *Id.*, at 13. Accordingly, the Court of Appeals held that any error in restricting Smith's impeachment of Warren was harmless beyond a reasonable doubt.

As we made clear in *Satterwhite* v. *Texas*, 486 U. S. 249 (1983), the question "is not whether the legally admitted evidence was sufficient to support" the verdict; rather, the question is "whether the [prosecution] has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *Id.*, at 258–259, quoting *Chapman* v. *California*, 386 U. S. 18, 24 (1967). In short, the adequacy of the legally admitted evidence is only one of the factors to be considered in determining the influence that the error had upon the jury. See, *e. g.*, *Arizona* v. *Fulminante*, 499 U. S. ___, ___ (1991) (slip op. 16–19) (focusing on the contribution of the coerced confession); *Satterwhite*, 486 U. S., at 259–260 (focusing on the contribution of testimony on future dangerousness).

In my view, the Court of Appeals misapplied harmless-error analysis in two respects. First, it gave only cursory consideration to how the error contributed to the verdict, summarily stating that Warren's testimony, "though undoubtedly helpful to the prosecution because he was a charged co-conspirator, was to a large extent either cumulative or generally corroborated by other testimony." *Smith*, *supra*, at 13. Rather, the Court of Appeals relied on its conclusion that the legally admitted evidence was "obviously sufficient to convict if believed." *Ibid.* The Court of Appeals' focus on the adequacy of the legally admitted evidence was error.

The Court of Appeals then compounded this error by considering the legally admitted evidence "in the light most favorable to the government." *Id.*, at 12. We have consistently held since *Chapman* that constitutional error "casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U. S., at 24. See also *Fulminante*, 499 U. S., at __ (slip op. 15) (prosecution has burden of demonstrating that admission of confession did not contribute to conviction); *Satterwhite*, 486 U. S., at 258–259. The Court of Appeals' review of the evidence in the light most favorable to the Government improperly shifted the burden to Smith.

In sum, focusing on the legally admitted evidence in the

light most favorable to the Government "preserves" the factfinder's weighing of the evidence. Such preservation is desirable when the reviewing court is examining the legal-sufficiency of the evidence. See *Jackson* v. *Virginia*, 443 U. S. 307, 319 (1979). Once the reviewing court has identified a constitutional error, however, it should not preserve the factfinder's tainted deliberation—it should dissect it. The reviewing court then must require "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U. S., at 24. Because the Court of Appeals' unpublished opinion* cannot be squared with our harmless-error precedents, I would vacate the judgment and direct the Court of Appeals to review the sentence under the proper standard.

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*The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the circuit and surely is as important to the parties concerned as is a published opinion.